

State of Vermont
WATER RESOURCES BOARD

PREHEARING CONFERENCE REPORT AND ORDER
(INCLUDING REVISED FILING SCHEDULE)

RE: Paul Dannenberg
P.O. Box 187
Huntington, VT 05462

Docket Number:
WQ-99-07
(Appeal of ANR Permit Re:
Application #1999-C01)

Statutory Authority:
10 V.S.A. §1269

I. BACKGROUND

On November 17, 1999, the Water Resources Board ("Board") received an appeal, pertaining to Agency of Natural Resources' ("ANR") issuance of an Aquatic Nuisance Control Permit granting Application No. IQQS-CO1 ("Permit"). The Permit was issued to James R. Martin of Huntington ("Permittee"). The appeal was filed by Paul Dannenberg ("Appellant") pursuant to 10 V.S.A. 61269. The Permit authorizes Permittee to use Aquashade®, a U.S. EPA-registered aquatic pesticide, to control nuisance aquatic plants and algae in two private ponds located on lands of the Permittee in Huntington. Appellant maintains that he is aggrieved by the issuance of the Permit and in support of that assertion states that, among other things, he owns a shallow spring within 300± feet of the larger of the two ponds which may be affected Permittee's application of Aquashade®.

On December 17, 1999, Board Chair, Gerry Gossens, convened the initial prehearing conference in the referenced matter. Participating in the prehearing conference were the Permit-tee, Appellant, and the ANR, by Jon Groveman, Esq. and Ann Bove. No other person either appeared at the conference or filed a written request to participate in this proceeding.

At the prehearing conference, Mr. Dannenberg filed a written request for party status and the participants briefly described the issues in this proceeding. Participants observed that there were several preliminary issues that should be addressed before scheduling a hearing on the merits. The preliminary issues identified by the participants and Board staff included the threshold question of Mr. Dannenberg's party standing, the appropriate scope of the appeal and other issues as required to properly frame the issues. Participants also agreed to pursue an attempt to resolve this matter informally. The prehearing conference was concluded prior to a full discussion of all issues and without establishing a definitive schedule for the pre-filing of direct testimony. Rather, Chair Gossens requested that the parties pursue a facilitated or mediated discussion during the early part of January in an attempt to resolve all or some of the disputes giving rise to the appeal. Chair Gossens set forth a deadline for a status report on any progress toward settlement, which report was due on January 20, 2000.

An extension of the deadline to file the status report was granted by the Chair and the Board continued to promote, and to the extent possible facilitate, informal resolution of this matter. Permittee confirmed that as of February 3, 2000, no mediation had occurred. Subsequent to February 3, 2000, an unsuccessful attempt at mediation occurred. Permittee continued to maintain that there was a question as to Appellant's standing and accordingly, on February 14, 2000 filed a "Motion to Dismiss the Dannenberg Appeal for Lack of Standing." The Motion to Dismiss concerns only the issue of whether Mr. Dannenberg is a person aggrieved pursuant to 10 V.S.A. §1269.

Prior to hearing oral argument on the Motion to Dismiss, Mr. Dannenberg and the ANR were provided an opportunity to file written responses to the Permittee's Motion to Dismiss. On March 14, 2000 at 12:00 p.m. at the Board's regularly scheduled Board meeting, the Board heard oral argument on the limited question of Mr. Dannenberg's standing to file the appeal. By an Order dated April 20, 2000, the Board denied the Motion to Dismiss and scheduled an additional prehearing conference. In denying the Motion to Dismiss, the Board noted that should any party provide sufficient evidence to support a conclusion that Mr. Martin's application of Aquashade" could not affect Mr. Dannenberg's water supply, this matter may be dismissed prior to a full hearing on the merits.

Under the authority of the Chair, Associate General Counsel Joe Minadeo ("Board Counsel"), met with the parties in this matter in a prehearing conference on Thursday, May 18, 2000 at the Board's office in Montpelier. On June 1, 2000, Board Counsel issued the draft Prehearing Conference Report and Order ("Draft Order"). Pursuant to Board Rule of Procedure ("WBR") 28(C), parties had not less than 5 days within which to file written comments. The deadline for receipt of written comments was June 8, 2000. Permit-tee filed comments on June 5, 2000; Appellant filed comments on June 8, 2000; ANR filed no comments.

On June 14, 2000, Permittee filed a Motion to Deny Mr. Dannenberg Party Status Pursuant to the April 20, 2000 Order of the Water Resources Board. Notwithstanding the caption of the motion, the Board will treat this as a Motion to Dismiss. The Motion includes a report prepared by Craig D. Heindel, CPG which concludes, that "there is no possibility that water from the Martin ponds, or Aquashade applied to those ponds, could reach the Dannenberg well." On June June 16, Appellant, Paul Dannenberg, sought approximately one month "to have [his] hydrologist review the report and respond to [Permittee's] motion to dismiss."

II. DISCUSSION

The primary focus of the prehearing conference was to define the issues in this proceeding, assuming that it were to go to a full hearing on the merits. Board counsel conducted a discussion of the issues and the parties contributed their

viewpoint as to the scope of this proceeding and the relevant sub-sections of 10 V.S.A. §1263a. Parties also discussed the establishment of a filing schedule, although it was the mutual preference of the parties to have Board counsel establish filing deadlines in the Draft Order and then, if necessary, propose to change those dates in their comments/objections to the Draft Order. Board counsel noted that a subsequent written notice would identify the time, date, and location of a merits hearing, and discuss the particulars of a site visit. Based on the events and filings occurring from the date of the May 18, 2000 Prehearing Conference and the present, the Board will significantly change the filing schedule that was contained in the Draft Order and re-schedule the merits hearing date in this matter to October 32, 2000. The August 8, 2000 hearing will be retained but will focus only upon hydrologists' reports, and oral argument on the Motion to Dismiss. Each party has been apprised of these scheduling changes by a telephone call from Board counsel during the week of June 19, 2000.

A. ISSUES

Prior to meeting on May 18, 2000, parties were directed to file memoranda with the Board identifying with specificity what they perceived to be the relevant issues in this proceeding. Such issues were not to expand those identified in the initial Notice of Appeal. Rather, the statements of issues are to narrow the focus of this proceeding. On Tuesday, May 2, 2000, Appellant identified those issues that he maintained to be within the scope of the appeal. These were stated as follows:

1. The pesticide is a risk to the non-target environment;
2. [the application of the pesticide poses a] risk to the public health;
3. Reasonable non chemical alternatives exist;
4. Permittee is using the pesticide for a non-permitted use;
5. [Applicant/Permittee has effected a] misrepresentation of material facts.

Other parties were provided until May 11, 2000 to file responses. On May 5, 2000, Permittee filed his Response to "the Statement of Legal Issues" filed by Mr. Dannenberg. Permittee claims that Appellant's statement of issues lack sufficient specificity to comply with the Board's April 20, 2000 Order. Permittee also claims that even assuming that the issues as stated are sufficient to comply with the Board's Order that each pertains only to Permittee's large pond, not the smaller pond. Also on May 5, 2000, Appellant renewed his Motion to Dismiss, this time on the same ground that had been raised previously (i.e. that the impacts of any application of Aquashade to Permittee's ponds could not impact Mr. Dannenberg's water supply well) and on the additional ground that Mr. Dannenberg has not allowed Permittee reasonable access to the Dannenberg

property. Without such access, Permittee claims that "Mr. Dannenberg's refusal to permit [a] site visit has eliminated Permittee's ability to provide sufficient evidence to support a conclusion that Permittee's use of Aquashade could not affect Mr. Dannenberg's water supply." ANR filed no reply to Appellant's statement of legal issues.

On May 12, 2000, Appellant filed a "Reply to Permittee's Second Motion to Dismiss and Response to Statement of Legal Issues." In his Reply Appellant: (1) objects to what he characterizes as Permittee's attempt to "interject irrelevant and frivolous matter into this proceeding", (2) claims that no site visit has been ordered by the Board; and (3) contends that Permittee's reply to the May 2, 2000 statement of legal issues is inadequate. It also contained evidentiary information which is more suitable to being presented as pre-filed testimony.

At the prehearing conference the issues referred to above were discussed at length, but were generally discussed in the context of the statutory guidelines of 10 V.S.A. §1263a. In terms of shaping Appellants issues in the form of the statutory considerations, the issues in controversy are as follows: **(a) is there no reasonable nonchemical alternative available (10 V.S.A. §1263a(e)(1)); and (b) is there an acceptable risk to the nontarget environment (10 V.S.A. §1263a(e)(2)); and (c) to the extent Mr. Dannenberg is a member of the public he may argue pursuant to 10 V.S.A. §1263a(e)(3) whether there is more than a negligible risk to public health, but in doing so he shall limit his evidence to the impacts to his water supply or his land or his use of receiving waters, Appellant shall not presume to advocate on behalf of his neighbors (for whom he is not a duly appointed representative) or on behalf of the public at large.**

In addition to the evidence that the Appellant will focus his case upon, it bears emphasis that the **Permittee/Applicant** is involved in a *de novo* proceeding in which he bears the burden of proving that an aquatic nuisance control permit should issue. In terms of evidence and issues, the Board will effectively stand in the shoes of the Secretary and shall follow the statutory guidelines for permit issuance as outlined in 10 V.S.A. §1263a. Having said this, the Board will focus on the issues with respect to which the Appellant has derived his standing to appeal this permit.

It is these issues upon which the parties were directed in the Draft Order to prepare testimony and establish a proposed site visit protocol.. The Board's factual findings and legal conclusions will also be oriented around the statement of issues, and a decision will issue based upon how the Board disposes of each. As noted above, the Draft Order was prepared by Board Counsel, and accordingly, pursuant to WBR 28(C), parties are allowed to respond to the Draft Order by filing written comments before the Draft Order is issued in final form.

In some respects, the comments that were filed subsequent to issuance of the Draft Order present new issues not covered by the Draft Order. Those issues which are not responsive to the Draft Order will be addressed in Section II.B. entitled "New Issues." With respect to comments germane to the Draft Order, the substance of those written comments is summarized below.

1. *Permittee's Comments on Draft Order*

On June 5, 2000, the Permittee filed a response to the Draft Order in which he requested until June 16, 2000 to file a hydrogeologist's report concerning the preliminary issue of whether there is a hydrological nexus between the Permittee's ponds and the Appellants water supply. Permittee also expressed concern about the extent to which Appellant provided access to Appellants property at the June 1, 2000 site examination. Finally, because Permittee has renewed his Motion to Dismiss, Permittee specifically requested that the Chair not include statements in the Prehearing Order concerning Appellant's party status. In response to that comment, the Appellant is correct in stating that the Board has ruled on questions of party status and standing in its April 20, 2000 Memorandum of Decision. However, as pointed out in Section V., Paragraph 1 of this Order, the Board nevertheless retains the authority, pursuant to WBR 24, to dismiss this appeal prior to a merits hearing if warranted.

2. *Appellant's Comments on Draft Order*

Appellant filed comments on the Draft Order on June 8, 2000. Appellants first comment is that the proposed schedule for filing rebuttal testimony is inappropriate. Accordingly, he seeks to have the Appellant and ANR file rebuttal testimony after the Permittee has submitted rebuttal. In this instance, Permittee will file the initial round of prefiled direct testimony prior to Appellant and ANR filing their own direct testimony. This is because it is the Permittee who possesses most of the information concerning the application. The filing schedule provides an opportunity for Appellant to file its own *direct* testimony, however, scheduling the Appellants and ANR's rebuttal deadline first, may enable the Appellant (and/or ANR) to effectively skip prefiled direct, and merely file testimony that is responsive to Permittee's filing. Moreover, this schedule allows Permittee an opportunity to address the rebuttal claims of the Appellant (i.e. the project opponent) in the context of filing his own rebuttal testimony. This eliminates the need for a round of surrebuttal testimony.

Appellant also contends that the Permittee's "renewal" of the previously filed Motion to Dismiss is inappropriate because Appellant contends that the May 4, 2000 dismissal request only concerns the alleged refusal to allow permittee a site visit. On this issue, Appellant overstates the claim that Permittee's objection was merely due to lack of sufficient access. The Board specifically retained as a

pending issue the question of whether there is a hydrological nexus between Permittee's ponds and the Dannenberg water supply well when it granted Mr. Dannenberg party status pursuant to WBR 25 "*subject to any party making a subsequent showing that the Permittee's application of Aquashade could have no effect upon [Mr. Dannenberg's] wafer supply.*" Re: Paul Dannenberg, Docket No. WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order (April 20, 2000) p. 6 at Section IV.B (emphasis added). Moreover, the Board in the same Memorandum of Decision put the parties on notice that consideration of such issue may occur in advance of a merits hearing. The Board stated that:

should any party provide sufficient evidence to support a conclusion that Mr. Martin's application of Aquashade® *could not* affect Mr. Dannenberg's water supply, this matter may be dismissed prior to a full hearing on the merits.

Id. at p. 5 (emphasis in original).

Permittee's complaint regarding access was part of his response to the Board that without the ability to inspect the site, Permittee would be precluded from gathering the type of information alluded to by the Board. Thus, the allegation made in the May 4, 2000 filing focused on lack of access but was clearly an effort to inform the Board that Permittee would seek to make a demonstration that, in fact, his use of Aquashade® could not affect Mr. Dannenberg's water supply. This issue is the essence of the Motion to Dismiss.

B. **NEW ISSUES**

1. Newly raised issues

Two new issues were introduced in the filings on the draft prehearing order and in subsequent filings. One issue concerns the Permittee's access to Appellants land for purposes of creating a report of the hydrological nexus between Permittee's ponds and Appellants water supply well. Another concerns the issue of the ownership status of Mr. Dannenberg's parcel. The former issue will be considered by the Board in the context of hearing oral argument on the Motion to Dismiss, which shall occur at the Board's previously scheduled meeting on August 8, 2000. The issue of ownership status shall be clarified by the Appellant in the context of **prefiled** testimony should the matter go to a merits hearing.

2. Modified Site Visit.

Because the Board has determined that it will hear additional presentations and oral argument on the issue of whether a hydrological nexus exists between

lands owned by the Appellant and those owned by the Permittee, it will convene a site visit in advance of that hearing. The only date and time which the Board has available for such visit is July 18, 2000 at approximately 2:45 p.m. Parties should be prepared to stipulate to a site visit protocol in advance of the Board's visit.

Such site visit protocol (if one can be agreed to) shall be filed by the parties not later than Thursday, July 13, 2000 and shall consist of an agenda not exceeding 15 minutes in length. If no such site visit protocol is filed, the Board will merely conduct a "drive-by" site visit in which parties are free to point out certain characteristics of the landscape, terrain and water features. No testimony will be taken during the site visit.

C. SCHEDULING

1. Appellant shall allow reasonable access to his land for purposes of an investigation on June 1, 2000 at 2:00 p.m. Board counsel will attend to ensure that sufficient access is allowed and so that the site investigation does not extend any longer than is necessary to conduct the investigation
 2. Permittee shall file not later than June 16, 2000 any evidence in support of a Motion to Dismiss the appeal on the basis that his application of Aquashade could have no effect upon the Appellant's water supply well.
 3. Appellant and ANR shall file, not later than Friday, **July 14, 2000**, any response to the hydrologists report filed by Permittee, or any independent report relative to the question of whether a hydrological nexus between Permittee's ponds and Appellants water supply exists, and if so, the extent of such nexus and how it impacts the potential for Permittee's application of Aquashade to affect the Appellants water supply well.
 4. Board site visit: July 18, 2000 at **2:45** p.m. (this is an approximate time as the Board is traveling from one hearing to another on this date and the precise ending time of the initial hearing is not known).
 5. On **Tuesday, August 8, 2000, at 1:00 p.m. at the Upper Valley Ambulance Training Room, 5445 Lake Morey East, Fairlee, Vermont**, the Board will conduct a hearing to consider the **written** filings concerning any hydrological nexus between Permittee's ponds and Appellants water supply well. The Board will provide 45 minutes for presentations of hydrogeologicat findings and conclusions, and for oral argument. 15 minutes will be allocated to each party. The Board will put its site visit observations on the record immediately preceding the parties'
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presentations.

6. Prefiled direct testimony:
From Applicant/Permittee not later than 4:30p.m. on Thursday,
August 17, 2000
From Appellant and ANR not later than 4:30p.m. on Thursday,
September 7, 2000
7. Prefiled rebuttal testimony:
From Appellant and ANR not later than 4:30p.m. on Tuesday,
September 19, 2000
From Applicant/Permittee not later than 4:30p.m. on Tuesday,
October 10, 2000
8. Proposed Findings of Fact, Conclusions of Law, and Order
From all parties not later than 4:30p.m. on Tuesday, October 17,
2000
9. Objections to prefiled testimony
From all parties not later than 4:30p.m. on Tuesday, October 17,
2000
10. Merits Hearing
On Tuesday, October 31, 2000 at a location and time to be
determined by subsequent written notice.

Parties are encouraged to organize their **prefiled** testimony, exhibits, and argument so as to eliminate redundancy and achieve efficiency in the presentation of their respective cases.

III. SERVICE LIST

The certificate of service accompanying this Prehearing Order shall be used to determine who should receive copies of all filings. Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service. Parties or their representatives are responsible for advising the Board of any changes in addresses, including changes related to the assignment of new 911 street numbers or seasonal changes in residence.

IV. OTHER

Those who have not yet done so are advised to obtain copies of the Board's Procedural Rules, effective February 22, 1999 to facilitate compliance with the terms of this Prehearing Order. These rules are also available by downloading text from the Board's **Web** site: <http://www.state.vt.us/wtrboard>

V. ORDER

1. The parties to this proceeding are:

Appellant Paul Dannenberg, Esq., pursuant to 10 V.S.A. §1269 and
and Procedural Rule 25(B)(7);

The Applicant, James Martin, Esq., pursuant to Procedural Rule 25(B)(1);
ANR, pursuant to Procedural Rule 25(B)(5);

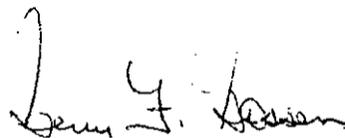
Despite Appellant meeting the threshold for standing pursuant to 10 V.S.A. §1269 and party status pursuant to WBR 25(B)(7), the Board may dismiss this matter pursuant to WBR 24, if **Permittee** and/or ANR demonstrate that Permittee's application of Aquashade could not affect the Dannenberg water supply well.

2. The Issues are as stated in Section II.A. and II.B.1., above.
 3. On Tuesday, **July 18, 2000 at approximately 2:45p.m.**, a brief site visit will be conducted by the Board commencing at the intersection of the Appellant, Paul Dannenberg's driveway and Delfrate Road in Huntington, Vermont.
 4. A second hearing on the Permittee's Motion to Dismiss shall be convened at the Board's previously scheduled August 8, 2000, Board meeting. Presentations and oral argument on **the** question of whether a hydrological nexus **exists between the lands of Permittee and Appellant will begin at 1:00 p.m.** The Board has allocated 45 minutes to hear argument relative to this issue with 15 minutes assigned to each party. Deliberations will take place immediately thereafter. The August 8, 2000 hearing will be convened at the location identified at Section II.C.5., above.
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5. Board counsel noted the addition of Board member Barbara Farr at the May 18, 2000 prehearing conference. A revised biographical summary was provided to enable any party having a potential conflict of interest or disclosure issues to notify the Board in conjunction with review of this draft Prehearing Order. Any requests for disqualification of any of the current Board members, or any requests for further disclosure, were to be filed on or before 4:30 p.m., Thursday, June 8, 2000. No such request for disqualification has been filed.
6. The exact time and location of the merits hearing, should one be required on October 31, 2000, will be provided in a subsequent written notice.
7. Parties shall file an original and seven collated copies of motions, legal memoranda, and any other documents filed with the Board, and mail one copy to each of the persons listed on the Board's Certificate of Service. The Certificate of Service may be further revised if party status objections are made and further determinations have been made. Legal memoranda shall be no more than twenty-five pages and proposed findings of fact and conclusions of law shall be no more than fifty pages. See Procedural Rule 10.
8. Pursuant to Procedural Rule 28(B), this Prehearing Order, once issued in final form by the Chair is binding on all parties who have received notice of the prehearing conference. A subsequent opportunity will be provided for the filing of objections to the order, in whole or in part.

Dated at Montpelier, Vermont this 27th day of June, 2000.

VERMONTWATERRESOURCESBOARD



Gerry F. Gossens
Chair